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IN THE SUPREME COURT OF THE STATE OF UTAH

NO. 19284

STATE OF UTAH,

Plaintiff - Respondent

vs.

BOYD DONALD BAGLEY,

Defendant - Appellant.

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

HONORABLE JUDGE HOMER F. WILKINSON, PRESIDING

BRIEF OF APPELLANT BOYD DONALD BAGLEY

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Clerk, Supreme Court, Utah

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IN THE SUPREME COURT
OF THE STATE OF UTAH
----oOo----

THE STATE OF UTAH, :
Plaintiff-Respondent :
vs. :
BOYD DONALD BAGLEY, : CASE NO. 19284
Defenant-Appellant :

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

The appellant, Boyd Donald Bagley, was tried in the Third Judicial District Court of the State of Utah for the crimes of Burglary, Theft and Making a False Report. The information charging the defendant with those crimes stems from a burglary that occurred on September 19, 1982 at a Rainbo Gas Station at about 33rd South and 31st East in Salt Lake City, Utah. A sheriff's deputy, David P. Smith, arrived at the scene during the burglary and although by his own statements clearly observed one of the burglars at close range in good light for several minutes, he was unable to positively identify the defendant as being the burglar when given an extensive opportunity to do so only hours later. The officer did, however, promptly identify the defendant at trial several months later.

DISPOSITION IN THE LOWER COURT

The appellant, Boyd Donald Bagley, was tried and convicted by the court, the Honorable Homer F. Wilkinson presiding, a jury having been waived, of one count of burglary, a third degree felony, one count of theft, a Class B misdemeanor, taking property of less than \$100.00 in value and of making a false report as to a stolen motor vehicle, a Class B misdemeanor. Appellant was sentenced to: serve a term at the Utah State Prison from 0 to 5 years and fined \$2,000 for the burglary conviction, that he serve 0 to 6 months in the Salt Lake County Jail and be fined \$299.00 for the theft conviction and also serve a term in the County Jail of 0 to 6 months and pay a fine of \$299.00 for the false report conviction. He was further required to make restitution of an as yet undetermined amount. The appellant was granted a stay of execution and placed on probation under the custody of the court and under the supervision of the Department of Adult Parole and Probation until further order of the Court. Such probation is to be conditioned upon:

1. The usual and ordinary conditions required by the Department of Adult Probation and Parole.

2. Pay a fine in the amount of \$750.00 at a rate to be determined by the Department of Adult Probation and Parole.

3. Pay restitution in an amount and at a rate to be determined by the Department of Adult Probation and Parole.

4. Enter, participate in and complete the Prison Diversion Program.

5. Enter, participate in and complete the program at the Weber County Alcohol Rehabilitation Program.

RELIEF SOUGHT ON APPEAL

APPELLANT SEEKS REVERSAL OF THE JUDGMENT RENDERED BY THE COURT BELOW.

STATEMENT OF THE FACTS

On the night of September 19, 1982 at or about 11:57 p.m., Officer Dave Smith of the Salt Lake County Sheriff's Office was patrolling the area of 3100 East and 33rd South in Salt Lake City. As he passed a gas station owned by Rainbo Oil Co., he noticed that there was a white Ford Courier pick-up truck parked near the north side of the office building. After passing the station he noticed that a window had been broken out on the north side of the office. He also noticed a male Caucasian in the station office apparently removing items from the cooler located along the east wall. Officer Smith then drove into the station and parked his vehicle in front of the white pick-up truck. As he was getting out of his car to investigate, he

saw a man leave the office and begin to walk toward the drivers side of the pick-up truck. Officer Smith, who was approximately 20 feet from the suspect, drew his service revolver and ordered the man to halt. Lighting conditions at the time are not known except that Officer Smith stated that he was close to the suspect and could see him clearly. The suspect did not stop but continued moving toward the vehicle, stating repeatedly "Don't shoot me, Don't shoot me". After the suspect had entered the truck, Officer Smith approached the passenger side of the small truck and while reaching inside and grabbing hold of the passenger continued to order the suspect to halt. Still the suspect failed to stop and in fact began to slowly back the truck into the northeast corner of the station lot with Officer Smith holding on to the passenger and demanding the driver to stop. The driver then changed gears and drove from the lot with Officer Smith still holding the passenger and talking with the suspect. The officer somehow became caught on the truck and was slightly injured as the truck drove away. Officer Smith managed to shoot at the right truck tires but the vehicle drove off. Officer Smith returned to his patrol car and radioed the description of the truck to dispatch. Minutes later, Officer Smith learned of an accident involving a white pick-up truck matching the description of the truck he had just seen. He drove to the scene of the

accident, some four blocks away, and met Officer Scott Robinson who had been assigned to investigate the accident. During that meeting, Officer Robinson showed a Utah Driver's License to Officer Smith and Officer Smith quickly identified the person whose picture was on the license as being the suspect that he had seen and talked to at the Rainbo station minutes earlier. On a second occasion that morning Officer Smith made a second positive identification of the suspect as being the person whose photograph was on the drivers license found in a wallet in the white pick-up truck. That license belonged to the defendant, Boyd D. Bagley.

Later that afternoon, Officer Smith was on the 9th floor of the Metropolitan Hall of Justice and noticed Detective Bringham talking to the defendant. He stood and watched him for several minutes but could not identify him. Officer Smith continued to observe the defendant for an additional 30 - 40 minutes, part of that time watching him from another room and part of that time in the room with the defendant listening to him talk to Detective Bringham. Because Officer Smith could not positively identify the defendant at that time as being the suspect he saw and talked with some hours earlier, the defendant was not arrested and was allowed to leave. The defendant was,

however, later arrested and charged.

ARGUMENT

Point 1

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE VERDICT

Appellant contends that the evidence was insufficient to support the judgment and that it would be a miscarriage of justice for this court to refuse review of his conviction.

The authority for the reviewing court to reverse a judgment based on an insufficiency of the evidence is clear and longstanding. That standard for finding an insufficiency of evidence is that:

It must appear that upon viewing the evidence, reasonable minds must necessarily entertain a reasonable doubt that the defendant committed a crime. State v. Wilson, 565 P.2d 66, 68 (1977).

A challenge to the sufficiency of the evidence was also discussed by this court in State v. Mills, 530 P.2d 1272 (1975):

For a defendant to prevail upon a challenge to the sufficiency of the evidence to sustain his conviction, it must appear that viewing the evidence and all inferences that may reasonably be drawn upon therefrom, in light most favorable to the verdict of the jury, reasonable minds could not believe him guilty beyond a reasonable doubt. 530 P.2d at 1272.

In State v. Garcia, 11 Ut. 2d 69, 355 P.2d 57
(1960) this court stated:

There is no jury question without substantial evidence indicating defendant's guilt beyond a reasonable doubt. This requires evidence from which a jury could reasonably find the defendant guilty of all material issues of fact beyond a reasonable doubt. 355 P.2d at 59, 11 Ut. 2d at 71.

In State v. Cooper, 114 Utah 531, 201 P.2d 764,
(1949), the court said that:

We do not ordinarily interfere with the rulings of the trial court in either granting or denying a new trial, and unless abuse of, or failure to exercise discretion on the part of the trial judge is quite clearly shown, the ruling of the trial judge will be sustained. 201 P.2d at 770.

Clearly then, each case must turn upon its own facts as to whether a new trial is merited due to insufficiency of evidence.

The State has the burden of proving beyond a reasonable doubt each element of the crime charged. Again from the Wilson court.

As to defenses in criminal cases the defendant has no particular burden of proof except that the evidence be such as to create a reasonable doubt of any element of the crime. The burden is on the State to prove his guilt beyond a reasonable doubt; and if the evidence with respect to any defense, e.g., in this instance, alibi, is sufficient to raise a reasonable doubt as to the defendant's guilt, he should be acquitted.

In this case it is clear that that State has made out the crimes charged in Counts 1, 2 and 3, but it is also

clear that the State has not met its burden as to the identification of the defendant as the person responsible for the commission of those crimes.

There may never have been a case wherein a positive identification should have been more expected than this. The witness was an experienced officer with some four years experience with the Salt Lake County Sheriff's Office. His testimony (TR 6-25) was that he first observed a Caucasian male in the glass walled office of a Rainbo gas station, that the station seemed to be well lighted. In fact, he could observe the suspect removing items from a cooler. He next testifies that after parking his car on the northside of the office, he saw a suspect leave the office and slowly walk to the driver's side of a small pick-up truck. During this time Officer Smith testifies he saw the man clearly, being about 20 feet from himself, and that he talked to the man, who was backing away from him, ordering the man to halt. The suspect while retreating to the drivers' side of the truck talked to the officer, repeatedly stating "Don't shoot me, Don't shoot me". Officer Smith then approached the passenger side of the truck as it backed into the corner of the station, took hold of the passenger's arm and continued to order the driver to stop. The officer's testimony is that he got a good look at the suspect's face all

during this time and that the suspect continued to look at the officer and plead that he not be shot. This situation continued as the driver shifted into drive and pulled out of the station, having driven a total of some 75 to 150 feet with the officer talking to and holding him at the point of a pistol. Minutes later Officer Smith identifies a drivers license picture found in the truck as being the same person that he had just had a confrontation with. Then some two hours later, he again identifies the same picture as being the suspect he had seen so well at the gas station.

However, later that day he happens to see the defendant in Detective Bringham's office. He testifies that he watched the man for some time but could not positively identify the defendant as having been the man that he had held at the point of his pistol some few hours earlier. The officer testifies that he observed the defendant for some 30 to 40 minutes from outside the office, from within the office during the questioning of the defendant and also for a time seated in another office watching the defendant through open doors. When asked by Detective Bringham if he could positively identify the defendant as being the suspect he observed at the gas station, he told this detective that he wasn't absolutely sure (TR. 42).

The defendant was released because Officer Smith could not make a positive identification only a few hours after he claims to have gotten such a good look at the suspect. In fact, he stated on the morning of the burglary that the suspect's face was burned into his memory. Officer Smith never gave a description of the passenger he claimed was in the truck at the time of the burglary in spite of his close proximity to the passenger. He claims to have held the passenger's arm for some time during the events of that late night/early morning encounter.

This kind of faulty memory is not consistent with the training and experience of this officer and should raise substantial doubt as to his later positive identification in court.

POINT II

THE IN COURT IDENTIFICATION OF THE DEFENDANT BY OFFICER SMITH WAS BASED ON A TAINTED AND SUGGESTIVE OBSERVATION DURING THE LONG PERIOD THE OFFICER OBSERVED THE DEFENDANT IN THE DETECTIVE'S OFFICE.

Where a prior tainted observation has occurred, the court must determine whether or not a later in court identification is the result of observation during the commission of a crime or if it has resulted from the tainted incident. The United States Supreme Court in U.S. v. Wade,

388 U.S. 218, 18 L.Ed. 2d 1149, 87 S.Ct. 1926, set out the following test:

Application of this test in its present context requires consideration of various factors; for example,

"The prior opportunity to observe the alleged criminal act,

The existence of any discrepancy between any pre-line up description and the defendant's actual description, any identification prior to line up of another person,

The identification by picture of the person prior to line up,

Failure to identify the defendant on a prior occasion, and the lapse of time between the alleged act and the line up identification.

It is also relevant to consider those facts which, are disclosed concerning the conduct of the line up."

While this case does not involve a line up per se, the same problem, with a tainted observation, is present. The Court was concerned with the situation where a witness is shown a suspect in such circumstances that the witness' testimony in trial as to the identification of the defendant is based on the tainted viewing and not on the witness's recollection of witnessing the crime itself.

The result of a suggestive or tainted pre-trial identification has been stated by several courts, among them the Supreme Court of Arizona in the case of State v. Strickland, 556 P.2d 320, 322 (1976).

"Ultimately it is the in court identification that we must be concerned with. If the identification is tainted with a prior identification, whether made at a suggestive police line up or at a suggestive preliminary hearing, the end result is the same: a high likelihood of irreparable misidentification and a concurrent denial of due process of law to the defendant.

Considering the facts of this case and applying the Wade test, there can be little doubt that the in-court identification of the defendant by Officer Smith was the result of a suggestive prior encounter.

1) Officer Smith by his own account had ample opportunity to observe the suspect at the gas station, indeed, he talked to him for some time and came to within 3 to 5 feet of the suspect while the officer was pointing his pistol at the suspect across the width of a small pick-up truck.

2) There is nothing in the record as to any description of the suspect by Officer Smith, but he does tell us that he didn't get any description of the passenger that he alleges he was holding on to.

3) Officer Smith, after his encounter at the gas station, quickly identified the drivers license photograph taken from the truck as being a picture of the suspect he had seen at the station.

4) However, Officer Smith failed to positively identify the defendant as being the person he had seen and

talked with only hours earlier.

5) The period of time between the two events, that is between the burglary and Officer Smith's observation of the defendant in Detective Bringham's office was in the nature of hours. Yet he could not make the identification.

In considering further the extent of the contact with the defendant, and the natural pressure that Officer Smith was under to make a positive identification of the defendant, it is entirely possible and even probable that during the time Officer Smith was observing the defendant, he substituted in his mind the identity of the defendant for the identity of the suspect that he had seen earlier that morning.

Certainly this prolonged and studied observance of the defendant and the officer's inability to identify him at the time would lead the common man to question a positive identification made months later in court. Officer Smith's positive identification in court was the result of his suggestive observation of the defendant, not his recollection of the suspect at the gas station.

POINT III

IMPROPER WEIGHING BY THE JUDGE OF THE STRENGTHS AND WEAKNESSES OF THE STATE'S CASE VERSUS THE DEFENDANT'S DEFENSE.

In his closing comments, the judge, (TR. 104-106) seemed to be balancing the State's case against that of the defendant. He acknowledged the concern he had about Officer Smith's identification at the Sheriff's Office but then mistakenly stated that Officer Smith had made the identification, the testimony of Detective Bringhurst (TR-42) was that Officer Smith had never made a positive identification at the office on September 20, 1982. Then, rather than considering the reasonable doubt raised by the inability of Officer Smith to identify the defendant, the judge raised slight inconsistencies in the three alibi testimonies. The only inconsistencies, however, were at times not material to the burglary. All three alibi testimonies were consistent within reason during the period of time during which the burglary was alleged to have occurred.

Again from the WILSON case previously cited:

"The defendant has no burden of proof except that the evidence be such as to create a reasonable doubt of any element of the crime. The burden is on the State to prove his guilt beyond a reasonable doubt and if the evidence with respect to any defense, e.g. in this instance alibi, is sufficient to raise a reasonable doubt as to the defendant's guilt, he should be acquitted."
State v. Wilson, 565 P.2d 66 (1977).

CONCLUSION


Reasonable doubt in this case has been raised in one area and supported by a second reasonable doubt in

another area. The defendant claims an alibi as established by three other persons. This doubt is strengthened by the reasonable doubt raised as to identification by Officer Smith. His inability to positively identify the defendant only hours after the officer had an exceptional opportunity to observe the burglary suspect raises substantial doubt as to the guilt of the defendant.

For these reasons the trial court erred in allowing an adverse judgment against the defendant based on insufficient evidence, which evidence was tainted by a prior "identification" and on a failure of the State to meet its burden of proving the defendant guilty beyond a reasonable doubt. The judgment should be revised and remanded to the trial court with directions to enter a judgment of acquittal on all counts.

DATED this 1st day of July, 1983.

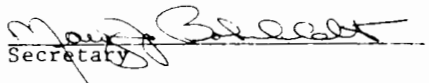
RESPECTIVELY SUBMITTED BY:



Kenneth L. Rothey
Attorney for Appellant

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing BRIEF to Richard D. McKelvie, Deputy County Attorney and Roger S. Blaylock, Deputy County Attorney, Metro Law Building, 431 South 300 East, Suite #2, Salt Lake City, Utah 84111, postage prepaid, on the 15 day of July, 1983.


Secretary